

Welcome to Civil Discourse. This podcast will use government documents to illuminate the workings of the American Government and offer contexts around the effects of government agencies in your everyday life. Now your hosts, Nia Rodgers, Public Affairs Librarian and Dr. John Aughenbaugh, Political Science Professor.

**N. Rodgers:** Hey Augie.

**J. Aughenbaugh:** Good morning, Nia. How are you?

**N. Rodgers:** I'm good. How are you?

**J. Aughenbaugh:** I'm good. Thank you.

**N. Rodgers:** I have a question for you.

**J. Aughenbaugh:** Okay. Hopefully, I'll have an answer.

**N. Rodgers:** Do large inflatable rats, have First Amendment rights? I'm asking for a friend, actually. I'm in all seriousness.

**J. Aughenbaugh:** Of all the questions you've started our podcast episodes with, that one actually took me back. I mean, it's not listeners as some of you have come to figure out. It's not all that often, then I'm speechless. But starting a podcast episode with to.

**N. Rodgers:** A few large inflatable rats have First Amendment rights. I think it's a serious legitimate question that should invite scrutiny.

**J. Aughenbaugh:** Okay.

**N. Rodgers:** I also think it's awesome. Just in case you were wondering. Although they scare me because they're quite large. These inflatable, scabby rats.

**J. Aughenbaugh:** Well, and also too, and I don't know how one judges this, but of all the animals in the world, I don't necessarily equate cuteness or troublesomeness.

**N. Rodgers:** Don't say it. You're going to make angry, all of our listeners who love rats. Oh my goodness. But these particular rats, you rat-loving listeners. These particular rats are not attractive, they are in a combative pose. They have blood around their teeth, they're very noticeable. Augie, will tell you the story of them because he sent it to me. The thing he sent to me with this picture of this giant rat with a story underneath, and I've had, I won't say nightmares, that's too strong. But the visual stays with you let me tell you. I will in fact see if I can put a picture up on the research side, of said particular inflatable scabby rats.

**J. Aughenbaugh:** Yes. In all seriousness, the topic we're going to be looking at today, concerns a ruling of a federal agency, the National Labor Relations Board. From July of this year, the National Labor Relations Board, the NLRB, affirmed the decision of an administrative law judge within that agency, that inflatable rats, and they're actually known as scabby, the rat.

**N. Rodgers:** Yeah. This thing has a name.

**J. Aughenbaugh:** Yeah, It has a name. Stationed at a neutral private sector employers location, did not violate the authorizing legislation of the board. Okay?

**N. Rodgers:** Okay. Can we back up and start?

**J. Aughenbaugh:** Yes.

**N. Rodgers:** Start at the beginning. What I think of is the beginning. The National Labor Relations Board.

**J. Aughenbaugh:** Yes.

**N. Rodgers:** That's a government agency. Right?

**J. Aughenbaugh:** Yeah.

**N. Rodgers:** How does it come into being?

**J. Aughenbaugh:** Okay. The board was created in the late 1930s. This was part of the New Deal, NEA. The National Labor Relations Act is also sometimes referred to as the Wagner Act, because the prime sponsor of the legislation, was New York, Senator Robert Wagner. Basically, the Board was created as a federal agency to ensure the rights of workers in the United States. In particular, the right of workers to unionize. This was the federal law where the government actually recognized, that workers had a legal right to unionize and that this board would make sure that employers, would treat them fairly, and allow them to engage in union activities at the work sites of employers across the United States. You had a question.

**N. Rodgers:** I do have a question. In the 1930s, what you're getting is people moving away from personal farming, which was a huge amount of American labor. In the turn of the century, you're getting the Industrial Revolution where people move into cities, and now they're working in factories. Those conditions were in some cases, horrific. They were dangerous, they were deadly, and so, you start to see agitation for, we should have some rights here. We shouldn't just be made to work or not made to work because I guess you could always quit except then how would you pay your bills. But a workweek is not a 70-hour, in a freezing cold basement somewhere, no light, no whatever. You're starting to see those kinds of movements, and that's what brings out unions. The theory of a union is collective bargaining. We are going to, as a group of workers, say to our employer, this condition is unacceptable, whatever the condition is, right?

**J. Aughenbaugh:** Yes.

**N. Rodgers:** We want to be able to collectively bargain to have the condition mitigated in some way, either pay us more because it's dangerous, stop doing the thing you're doing because it's going to kill us. Then the government says, okay, we will set up some arbitration for this. Is that?

**J. Aughenbaugh:** Well, before the National Labor Relations Act, it was an unknown question as to whether or not the federal government, or for that matter, state governments would protect workers' rights to unionize, to bargain collectively.

**N. Rodgers:** Okay.

**J. Aughenbaugh:** Because at various times, at the turn of the 20th century in the first roughly three decades, or the first two and 1/2 decades of the 20th century, sometimes the government would actually use government agents to stop labor strikes, or efforts to bargain collectively. Again, listeners, the theory of unions is that an employer can be successful in negotiating with an individual worker. I mean, because they can basically go in and tell an individual worker if you don't like to conditions, you don't like the pay, you don't like the hours we want you to work, well, then fine. Leave.

**N. Rodgers:** Don't let the door hit you where the good lord split you.

**J. Aughenbaugh:** That's right. Okay?

**N. Rodgers:** As they say occasionally.

**J. Aughenbaugh:** But if all of the workers.

**N. Rodgers:** Oh well, we're all going to leave.

**J. Aughenbaugh:** Okay.

**N. Rodgers:** Okay. Wait. No.

**J. Aughenbaugh:** Yeah. It is the collective, if you will power enforce the will by numbers. That will force an employer to negotiate in good faith, right?

**N. Rodgers:** Okay.

**J. Aughenbaugh:** In an attempt to address these abysmal working conditions, in many industrial sites across the United States, the federal government, finally with the Wagner Act, the National Labor Relations Act, went ahead and said one; unions do have a legal right to exist. We're going to create an agency, that will make sure that these negotiations and these activities that both employers and employees might want to engage in are "fair." This will take us back to one of our favorite phrases in this

podcast. Neither party is acting in an arbitrary and capricious manner. Now, almost immediately, the law, and the board, were challenged as being unconstitutional.

**N. Rodgers:** Well, I can't imagine that in a society based on capitalism, that the rights of the workers is going to be high and the priority of businesses to support. Rich dudes are going to say no.

**J. Aughenbaugh:** Yeah. Also, think about it in terms of capitalism. We have a US Constitution that has, if you will, enshrined as an important civil liberty property.

**N. Rodgers:** Right.

**J. Aughenbaugh:** In purely capitalist terms, workers are capital. They're are assets.

**N. Rodgers:** They're an asset, right.

**J. Aughenbaugh:** Okay. They are the property of the employer who has hired them as an agent. I know that sounds rather holding it personal.

**N. Rodgers:** No, but businesses, when they want to say good things to the employees they'll say, "You're our best asset."

**J. Aughenbaugh:** Yes.

**N. Rodgers:** If you pull that sentence apart, you're like, wait, you think I'm an asset? Like you think I'm a thing you own. I don't feel that great about that. That's not what happens, what people do is clap and say, "Yeah, they love us because they say we're great assets." I'm like but if you think about the definition of that, what they're saying is that your great chattel property, but anyway, separate issue we can discuss in an entirely different episode.

**J. Aughenbaugh:** Yeah, because the downside is the other characterization. You're not an asset, but you are a negative cost to our bottom line.

**N. Rodgers:** You're a liability.

**J. Aughenbaugh:** Yeah, you never want to hear that you are a liability or you're a negative cost on our bottom line. When you fall into that category, you should probably go ahead and update your resume, right?

**N. Rodgers:** Yeah. But when they're talking about you as an asset, they're trying to sell it to you as a good thing?

**J. Aughenbaugh:** Good thing.

**N. Rodgers:** But this all comes back to your beloved favorite part of the Constitution.

**J. Aughenbaugh:** The Commerce Clause.

**N. Rodgers:** The Commerce Clause.

**J. Aughenbaugh:** Sure.

**N. Rodgers:** Everything in Aug's world, for listeners who have joining us for their first episode, let me warn you that every single thing that Aug ever thinks, feels exists in his world, he can draw a line back to the Commerce Clause in the Constitution.

**J. Aughenbaugh:** The Supreme Court case that I'm talking about was decided in 1937.

**N. Rodgers:** The one that upheld the [inaudible 00:12:14] creation?

**J. Aughenbaugh:** Yeah. The Supreme Court held in the case of the National Labor Relations Board versus Jones and Laughlin Steel Corporation, that Congress had the constitutional authority to pass the law, giving unions the right to organize, to negotiate collectively with employers because labor conditions, labor relations effect, as [inaudible 00:12:53] just pointed out, interstate commerce.

**N. Rodgers:** So Act gets created, steel companies like, no. This is not constitutional because this is [inaudible 00:13:09] current Supreme say. It turns out it is constitutional because you'll selling stuff. If you were just a charity, it wouldn't be constitutional. Sorry, you want to make money, that's commerce, go away.

**J. Aughenbaugh:** By the way Nia, and this is a slight digression, in historical aside, if you will. This is the case. Many constitutional law scholars point to as the Supreme Court changing its mind about the constitutionality of many new deal programs. Because it was in this case that Justice Owen Roberts voted with the majority and basically continue to do so for the rest of his time on the court, upholding the federal government's regulations of national economic conditions. Okay?

**N. Rodgers:** Okay. Because before hadn't there have been some contention between Roosevelt and the Supremes about the constitutionality of the new deal and various programs within the new deal and all that stuff.

**J. Aughenbaugh:** New deal, that's right. Prior to this case, a narrow majority of the Supreme Court, and Justice Owen Roberts would occasionally vote with four other Justices, and declare that new deal programs exceeded Congress's Commerce Clause authority. But this is the case of the "the switch in time that saved nine" because Robert switched if you will, his vote, his thinking on the constitutionality of the new deal, and it basically undercut FDR's court packing plan. Because you can't go ahead and claim that the Supreme Court is.

**N. Rodgers:** Biased against you if they support leader?

**J. Aughenbaugh:** If they start upholding the programs that you are advocating for.

**N. Rodgers:** Quick giving me what I want because you're giving me what I want and I want to pack the court. No, that's not how this is going to work.

**J. Aughenbaugh:** Yeah. Any desire you might have to get rid of old, just federal judges who have antiquated notions about the nation's economy in the US Constitution, well, they seem to be coming along. They've adjusted their thinking. But anyways.

**N. Rodgers:** I'm sorry.

**J. Aughenbaugh:** That's the foundation of the National Labor Relations Board.

**N. Rodgers:** By the way, those decisions can be found many of them online. I'll put a link to him. But the older decisions from the '30s, '40s, '50s, are in print in the government documents system.

**J. Aughenbaugh:** Yes.

**N. Rodgers:** They may not be your local library, but they can't be gotten for you if you're interested in seeing, and the labor board settles all kinds of disputes. It's not just Scabby the Rat which you're going to talk to us about in a few minutes. But they settle a lot of disputes about dangerous conditions, about what constitutes that in a particular situation, or whether an employer has been disregarding people's safety. They are part of that system that makes those decisions.

**J. Aughenbaugh:** The overall purpose of this particular podcast episode listeners is that Nia and I wanted to go ahead and explore the power and authority of a federal agency, the National Labor Relations Board, that many Americans probably don't know exist. But their rulings control so much of the interaction between workers and employers. Many of us have a tendency to think, well, until a case gets to the Supreme Court, nothing that the government does is final. But that's not the case, and the National Labor Relations Board is a really good example of how so much of what bureaucratic agencies do can have a huge impact on things like worker relationships with employers. In the case that we're talking about here, the National Labor Relations Board decision in the Scabby the Rat case, actually the official name of the case and it's long-winded, International Union of Operating Engineer's Local Union number 150, in cooperation with the International Union of Operating Engineer's, AFL-CIO, and here's the opposing party, Lippert Components Incorporated. We will give you a link to the PDF decision handed down by the National Labor Relations Board. I'm going to briefly discuss the case facts, Nia, and then we're going to talk about Scabby the Rat, okay?

**N. Rodgers:** Okay.

**J. Aughenbaugh:** Lippert Components supplies component parts to the recreational vehicle industry. For our listeners who don't know, there is an entire industry that builds RVs, recreational vehicles.

**N. Rodgers:** Heck yeah. When I retire I'm going to buy one and drive all over the country and go to all the national parks. The earlier episode of National Park visits.

**J. Aughenbaugh:** Yeah. I have a couple of family members, Nia that own RVs. Before the pandemic, every summer, they would take their vacation from work and they would spend two to three weeks just driving their RVs to various parks as Nia just mentioned. See our previous episode about national parks. Of course, my favorite story about RVs is that we actually have a US Supreme Court Justice, Clarence Thomas.

**N. Rodgers:** Yes, we do. It's right, you might see Justice Thomas parked next to you in the national park hooked up to the waterline and sitting out having a beer. Actually, I don't know if he drinks beer or not.

**J. Aughenbaugh:** Clarence Thomas and his wife Jenny about a decade ago when he bought a high-end RV.

**N. Rodgers:** That is the other thing those RVs can come in the form of I tricked out my van to be an RV, that's van life for people who want to go look on YouTube. That's the cheapest level of that, but that's not the equipment we're talking about. We're talking about that high-end 200, 300, \$400,000 RV that is basically your house on wheels. It does everything. Here's my movie screen where I can watch the latest releases of whatever. Yeah, it's amazing what they can do with an RV.

**J. Aughenbaugh:** Listeners, some of these RVs are probably better equipped.

**N. Rodgers:** Than my apartment for sure. For sure. Some of them are bigger than my apartment, some of them are the size of a semi. But anyway, they make these components.

**J. Aughenbaugh:** They supply component parts to the RV industry. They rented equipment from a firm that was involved in a labor dispute with the International Union of Operating Engineers.

**N. Rodgers:** Lippert is just renting equipment from Bob's company. Bob's company is the one that's in the dispute with its labor force?

**J. Aughenbaugh:** Yes. Okay.

**N. Rodgers:** In this case, Bob's company is the

**J. Aughenbaugh:** Thor Industries.

**N. Rodgers:** the other firm? Okay, Thor.

**J. Aughenbaugh:** Thor Industries.

**N. Rodgers:** Thor, even better than Bob, that's going to use from now on. Okay.

**J. Aughenbaugh:** Yes. In the language of the National Labor Relations Board, Lippert Components is a neutral party.

**N. Rodgers:** Right because they're not involved in that, they don't have a problem with their employees. They don't have a problem Thor's employees because they're not part of that. They're just

**J. Aughenbaugh:** That's right.

**N. Rodgers:** Renting the equipment. Like when you go and you rent a vacuum, like a floor cleaner from Kroger. If Kroger's having a dispute with its employees, that's got nothing to do with you.

**J. Aughenbaugh:** Yeah.

**N. Rodgers:** You are just here to get the floor cleaner. That's all you're here to do.

**J. Aughenbaugh:** Yeah, and the floor cleaning company would be the neutral party.

**N. Rodgers:** Right.

**J. Aughenbaugh:** But one of the tactics that unions will use to put pressure on the employer that they do have a dispute with is to petition, okay? Lobby, okay?

**N. Rodgers:** Yell at.

**J. Aughenbaugh:** Yell at, pass out handbills and flyers to companies that do business with the employer, that the union has a dispute, and that's what happened here.

**N. Rodgers:** So Lippert is the one who ends up with the rat on their front lawn?

**J. Aughenbaugh:** That's where we get to scabby the rat. The union in this case, employed various inflatable scabby the rats outside of the Lippert companies exhibit at a trade show to bring attention to the fact that some of the companies doing business with the Thor Industry, need to put pressure on the Thor industry to actually negotiate in good faith with the union. Lippert Components was like, hey wait a minute here.

**N. Rodgers:** We didn't do anything. We're not responsible for Thor's difficulties with its employees. We are not the world's peacekeepers nor are we the world's union solving issue, like this is not okay.

**J. Aughenbaugh:** Yes. Okay.

**N. Rodgers:** Oh, side note to the side note. Scabs are people who cross picket lines

**J. Aughenbaugh:** Yes.



**N. Rodgers:** Or strike lines. If a union strikes out of a shop and somebody comes into work, like an outside person comes into work, they're not part of the union or their union member

**J. Aughenbaugh:** Yes.

**N. Rodgers:** They're called scabs.

**J. Aughenbaugh:** Yeah.

**N. Rodgers:** That's the crude mean term for them. I mean, that's just a person who needs a job, but whatever, that person is called the scab because they're not supporting the union, hence the scabby, and you're being a rat because you're also not supporting the union, right? That's the reason he's got that name.

**J. Aughenbaugh:** That's right, and it is a large inflatable rat.

**N. Rodgers:** How how tall is he?

**J. Aughenbaugh:** Do you recall what is it?

**N. Rodgers:** He's 12 feet tall. He's a 12-foot tall, bloody mouth rat. If that was outside of my business, I would want that taken down immediately. Like that's drawing inordinate negative attention to my business. That is not okay.

**J. Aughenbaugh:** Yes and a reasonable person would draw the inference that the union has issues with the neutral party.

**N. Rodgers:** Exactly. That the neutral party has done something bad.

**J. Aughenbaugh:** Yes.

**N. Rodgers:** That's what I would think. If I drove by a 12-foot tall rat in front of your house, I would think, Oh, that guy has really pissed somebody off and his family.

**J. Aughenbaugh:** Yes.

**N. Rodgers:** Right

**J. Aughenbaugh:** Yes. What you have here is the classic constitutional rights conflict. On one hand, the union argues we have first amendment rights to peaceably assemble. To protest.

**N. Rodgers:** Right.

**J. Aughenbaugh:** Okay? Whereas Lippert Components argues, hey, we have a constitutional right to use our property to engage in our business without this negative attention, without this harassment.

**N. Rodgers:** Right.

**J. Aughenbaugh:** Right? Now, not surprisingly, the Supreme Court in a case in 1989, the Florida Gulf Coast Building and Construction Trades Council case drew a distinction between active union protests versus merely handing out handbills and other protected expressive speech. Basically the court went ahead and said that

**N. Rodgers:** Okay. Picketing is an active thing, right? You're standing out front,

**J. Aughenbaugh:** Yes.

**N. Rodgers:** you're walking back and forth. You're clearly drawing attention physically and you're probably shouting things.

**J. Aughenbaugh:** Yes.

**N. Rodgers:** As opposed to, I'm just handing you a piece of paper that says, this company sucks and here's why.

**J. Aughenbaugh:** Yeah, they do business with another business who treats their workers poorly.

**N. Rodgers:** The Supremes have pulled those two things apart and said they are different.

**J. Aughenbaugh:** That's right, yeah the latter is protected, the former is not.

**N. Rodgers:** Because the former is harassment.

**J. Aughenbaugh:** That's right.

**N. Rodgers:** Okay.

**J. Aughenbaugh:** The National Labor Relations Board has taken that Supreme Court ruling, and in the case of Lippert Components, one of their administrative law judges ruled against Lippert Components and the National Labor Relations Board in a three to one decision confirmed the administrative law judges decision.

**N. Rodgers:** Saying, it's okay for you to put up a rat in front of these peoples because it's passive?

**J. Aughenbaugh:** It is passive. That's right.

**N. Rodgers:** It's just standing there being creepy.

**J. Aughenbaugh:** Yes. That's right.

**N. Rodgers:** Yeah, I mean, I find it creepy. Some people might find it adorable, but I find it creepy.

**J. Aughenbaugh:** But you emphasized the correct adjective. It's passive, right?

**N. Rodgers:** Right. It's just standing there.

**J. Aughenbaugh:** Yeah, it is just standing there.

**N. Rodgers:** If it were standing there, but it had a microphone inside and they had recorded messages that were, you know, these people are scum and blah, blah, blah. That might change that decision.

**J. Aughenbaugh:** Yes. Or if it was a robotic rat.

**N. Rodgers:** Twelve-foot rat, now, that is the thing of my nightmares. Thank you.

**J. Aughenbaugh:** Okay. That went ahead and got in front of your face or one of its paws went ahead and clutch people as they walk into your business, okay? Or try to bite you.

**N. Rodgers:** The thing about picketing too is that picketing usually takes place on a site, like it makes it harder to physically get into the building because that's the point of picketing. Point of picketing is to make people have to walk through a phalanx of people who are grumpy at this company in order to get into the company. Whereas a rat standing off to the side of a door is gross, and it's scary, but it's not preventing you from

**J. Aughenbaugh:** Yeah, in economics terms, Anita, what you're describing is the purpose of picketing is to not only draw attention to somebody or some businesses or some government agency's behavior that the picketers find troublesome. The idea of picketing is to, in economic terms, increase the transaction costs of those neutral parties who want to do business, okay?

**N. Rodgers:** I see. Right. Somebody has to cross that line. They have to have courage to do that. They have to really want what's inside. They're going to get inside and they're going to say what the hell is all that about?

**J. Aughenbaugh:** They may be video, they may be recorded. As frequenting a business, again, who mistreats their unions or discriminates against these people. I live nearby to the Virginia Employment Commission office here in Richmond. I've actually seen a lot of unhappy people in the last few months because the VEC has a huge backlog of appeals. Trying to get into that building where you have people outside who are like, "These people don't care about those of us who are unemployed." That increase their transaction cost. It makes you think twice about wanting to enter the building.

**N. Rodgers:** If it's a business it's going to lower their commerce. Some people are going to drive up and say, "Oh heck no". They're going to drive away. They're just not going to be interested.

**J. Aughenbaugh:** They're going to go to another business, whatever the case may be. But the larger point here and this is what fascinates both you and I about this, is that the National Labor Relations Board has the authority to conduct a hearing and issue a decision that has the effect of a court decision, and this is what's called adjudication. Administrative judicial proceeding. Notice the combination of the two words there. It's an administrative judicial, if you will, hearing in decision. This isn't a court per se issuing a decision. This is an administrative body, a bureaucratic agency that has been given authority by Congress to go ahead and judge whether or not somebody has complied with or violated National Labor Relations Board Regulations.

**N. Rodgers:** I just say though, it is vitally important that we have these agencies because the court system would be so clogged. We would never get anything decided by anybody because there would be so much backlog. Right before we met, I pulled up the labor relations because I wanted to see what their most recent case is and by the way, their most recent case was yesterday. Yesterday they had 10 filings. It may be more than that. No, it's more like 20 filings yesterday. I mean if that's one day out of the year, so they're getting filings at that number. If that was in the regular court system. Holy cow [inaudible 00:34:27] talk about uneven management if it was in the courts all the way across the United States at various levels and it would be terrible.

**J. Aughenbaugh:** You just mentioned one of the two main reasons why supporters advocate for agencies to have the authority to engage in adjudication. The one reason you just mentioned, if all of these disputes went to court, it would grind our federal court system to a screeching halt. The second is, is it not better to have the experts in labor law that work for the National Labor Relations Board take a first cut at these disputes, before sending these disputes to very general, let's face it, federal court judges are generalists. Not only do they hear constitutional disputes, but they may hear legal disputes about labor, the environment, commerce, the treasury department, drug crimes. They're generalists, but adjudication within agencies is done by the experts in labor law.

**N. Rodgers:** You have labor law lawyers who are coming before labor law specialist to have a labor law discussion. You're cutting out all the people who are saying, "Now, could you explain to me a union again?" Judges know what unions are.

**J. Aughenbaugh:** [inaudible 00:36:22] We actually spend a couple of minutes explaining the concept of a neutral party as it relates to the National Labor Relations Act,.

**N. Rodgers:** Which you would never have to do in that situation because they all know what that is.

**J. Aughenbaugh:** They all know it.

**N. Rodgers:** The first thing you'd say is, "Your honor, we're a neutral party." That's the first thing you'd say, even if you're just talking to the board, you would say, "Ladies and gentlemen, we're in neutral party."

**J. Aughenbaugh:** We need the definition of a neutral party and X, Y, and Z, while the rest of us would be stumbling saying, "Wait a minute, can you-all wait? Because I need to go ahead and find that section of the National Labor Relations Act, which actually defines a neutral party."

**N. Rodgers:** They know it [inaudible 00:37:13]

**J. Aughenbaugh:** They know the chapter and the verse. They know the regulations that are further explained what a neutral party is. The rest of us would be like, hey, I'm going to have to get back to you.

**N. Rodgers:** I can see though on the flip side where people might say that is an awful authority for one group of people to have. They get to decide and then there's no disputing. There's no appeal process. The appeal process for that is to then go to the regular court system and attempt some other constitutional argument or something else.

**J. Aughenbaugh:** Basically what you have here is liberal components first had a hearing in front of an administrative law judge, an ALJ.

**N. Rodgers:** Who is a trained judge like that is a person who is trained in the law. I couldn't be an administrative judge?

**J. Aughenbaugh:** No, an administrative law judge is somebody who has developed an expertise in that specific area of the law. You have administrative law judges who for instance, work for Immigration and Customs Enforcement. They are immigration law experts.

**N. Rodgers:** They are appointed?

**J. Aughenbaugh:** Yes, and this is part of the controversy about administrative law judges. Administrative law judges, they are known as Article 1 judges, meaning congress has created them, and they don't work for the federal court system. They work for executive branch agencies.

**N. Rodgers:** They might favor the agency?

**J. Aughenbaugh:** That is one of the complaints of bar associations is that these judges are hired by agencies to issue decisions about agency behavior, and they don't have life tenure like Article 3 judges, they're usually employed on 8-10 year contracts and they can be fired without cause.

**N. Rodgers:** They need to find in favor of the agency to keep their job is a potential.

**J. Aughenbaugh:** It's a potential, if you will, variable to impartiality.

**N. Rodgers:** You said something and I want to make sure that we're clear with our listeners. When you say Article 1 or Article 3, you are referring to the Constitution of the United States?

**J. Aughenbaugh:** That is correct.

**N. Rodgers:** Article 1 gives all the congressional powers. Article 2 gives all the presidential powers, and Article 3 is the afterthought. By the way, we should have a court system.

**J. Aughenbaugh:** Federal court system.

**N. Rodgers:** By the way, I say that only because it's short.

**J. Aughenbaugh:** She says that listeners sarcastically because, again, in previous podcast episodes, we have both remarked that when you compare Article 3 to Articles 1 and 2, it really did look like the delegates at the Constitutional Convention were just like, "Yeah, we should probably have an independent judiciary, but we've spent a lot of time here in Philadelphia."

**N. Rodgers:** It's hot. We want to go home.

**J. Aughenbaugh:** "In the summer, and I haven't seen my family and it's a really long carriage ride back to Mane".

**N. Rodgers:** Let's just jot something down and we can move on.

**J. Aughenbaugh:** Let's go back to this case. Liberal components first had a hearing in front of an administrative law judge. The administrative law judge issued a decision, and at that point, the decision is not final until the board, the National Labor Relations Board, either accepts it or rejects it.

**N. Rodgers:** That's your secondary level of accountability.

**J. Aughenbaugh:** That's the checking balance within the National Labor Relations Board. Until the board issues a final decision, liberal components cannot file a lawsuit in federal court. Why? Because of a rule of justice ability known as rightness. A case is not right for the federal courts to hear until the parties have exhausted all other avenues of appeal and technically until the National Labor Relations Board issues a final decision. That's not a completed appeal process. Yes. By the way, by the time you work through the agency hearing an appeal process, most Americans do what?

**N. Rodgers:** I would assume they give up.

**J. Aughenbaugh:** They give up.

**N. Rodgers:** They're exhausted, their business is either run into the ground.

**J. Aughenbaugh:** The system has chewed them up and spit them out. But again, let's just say for instance, Nia, Lippert components doesn't want to go through the hearing in front of administrative law judge. Then we're back to the concern you referenced a few moments ago. Everybody that gets an adverse, if you will, decision from a federal government administrative agency would just run to court.

**N. Rodgers:** All this would do would delay it.

**J. Aughenbaugh:** Yes. Then you would have executive branch agencies basically spending all of their time not actually implementing laws, but defending themselves where, Nia?

**N. Rodgers:** In the various court systems.

**J. Aughenbaugh:** That's right. In the federal courts. Now you would have both an executive branch, but also a judicial branch problem because the executive branch would not be implementing law and the judicial branch would be like, oh good Lord, we got yet another National Labor Relations Board case.

**N. Rodgers:** The National Labor Relations Boards members are appointed presidential appointees or are they-?

**J. Aughenbaugh:** The NLRB's board members are appointed on staggered terms. No one president theoretically can appoint all the members to the National Labor Relations Board. They are considered an independent regulatory commission. When the National Labor Relations Board was created, the thought was we need to remove politics from what the board does because if unions thought that board members were only appointed by business-friendly presidents, then they would have no faith in the board.

**N. Rodgers:** Right.

**J. Aughenbaugh:** Businesses would have no faith in the board if union-friendly presidents appointed members to the board.

**N. Rodgers:** So they're staggered for that reason so that you always have a mixture.

**J. Aughenbaugh:** Yeah. They are staggered for that reason, that's right.

**N. Rodgers:** You always have a mixture?

**J. Aughenbaugh:** Yes.

**N. Rodgers:** Although some presidents choose not to put people on the National Labor Board and not just for this agency, but also for other agencies that have a similar system. Sometimes they won't appoint board members because they don't believe in the agency or they want to weaken the agency or they want to weaken the system.

**J. Aughenbaugh:** President Trump avoided putting members on certain boards because most independent agencies cannot meet an issue final decisions if they don't have a quorum.

**N. Rodgers:** Right. Which would be three out of five.

**J. Aughenbaugh:** That's right.

**N. Rodgers:** If the positions are open and you don't fill them they can't meet and they can't solve things. I noticed one of the things that was filed yesterday, one of the allegation. There's always a list, I will put a link to the case listing so that you can just if you're curious, go look. Basically, tells you who's putting the dispute in, and then it puts in the allegation. The allegations are things like bad faith negotiating or communicating threats. It's that thing that they are trying to settle. Did these companies say they were going to work with the union and then walk away from the table? You don't get to do that. If you say you're going to negotiate in good faith and you have to actually do it.

**J. Aughenbaugh:** Well and also vice versa. Employers, in file claims with the National Labor Relations Board accusing unions of engaging in behavior that is prohibited by the law, which is what Lippert components did. Lippert components went ahead and said, "Hey, wait a minute here. We didn't do anything wrong and this union is engaging in speech activities that violates the National Labor Relations Board Regulations." But anyways, you had an example you wanted to touch upon.

**N. Rodgers:** Well, I just wanted to read off and by the way, I'm not suggesting that any of these companies are acting in bad faith or good faith. I don't know. These are all the initial filings, but I just wanted to read off Aramark, Albertsons, Kaiser Permanente, United Parcel Service has three, the United States Postal Service, Durham School Services. It's not GT technologies, United States Postal Service, again, Frontier communications, Teamsters Local. It doesn't matter whether the firm is private or public. It doesn't matter whether it's a government agency or not a government. All of those labor disputes are filed with this particular group.

**J. Aughenbaugh:** Sure.

**N. Rodgers:** That's why you get hundreds and hundreds and hundreds of filings in a month. The issue that Amazon has had with unions and union-busting or not telling people that they're allowed to unionize, each one of those cases in each one of those Amazon warehouses would come up separately. It doesn't come up as all of the employees of the United States Postal Service are bringing office dispute. It's the United States Postal Service in Hopkinsville, Kentucky is this particular one that I'm looking at.

**J. Aughenbaugh:** Yes.

**N. Rodgers:** There are assigned regions. There's regions for the labor board. Well, it's not one set of judges. It's judges in the region in Ohio and the region in Georgia and the region in Illinois and the region in Virginia. Because they're trying to settle it as locally as they can it sounds like.

**J. Aughenbaugh:** Well, and meaning even before a judge gets involved, you might have a staffer for the National Labor Relations Board that will take a look at the claim and then make a recommendation as to how the board can best address the dispute without there being a National Labor Relation Board hearing. Hearings are costly. Nia, you and I've talked about this. Whether we talk about a court case in a federal court system, a state court system, but even cases for agencies that have the authority of



conducting adjudication, hearings are expensive. You're going to have staffers who are going to read these complaints and make a recommendation to board attorneys and higher-ups.

**N. Rodgers:** Right.

**J. Aughenbaugh:** Hey, this might be the best way to arbitrate this dispute without a hearing. Because once it goes into the hearing system, then things tend to get adversarial. You're talking about employers in unions who all of a sudden have to drop everything for the hearing. Administrative hearings are not as rigorous as federal court hearings, but they have to follow a process. That's actually laid out in a law that we've discussed previously on this podcast, the Administrative Procedures Act of 1946. An agency just doesn't go ahead and say, "Yeah, we really don't like the United States Postal Service. Postal Service, you violated one of our regulations." No, they got to follow a hearing process.

**N. Rodgers:** Side note, I can tell you that looking at the process for this board, there is a charge. Then it goes to an investigation which can either lead to withdrawal or to an injunction. Then after that, there's the complaint and the answer which can lead to an injunction or it can lead to a hearing and decision. Then beyond that, there's dismissal or remedial order or other disposition. Seriously, these are the processes and then the court enforcement and review at the end. That's why it's exhausting.

**J. Aughenbaugh:** The hope is when Congress gave executive branch agencies, by and large, starting with the New Deal adjudication authority, the hope was, again, you're talking about competing interests, that's the balancing of competing interest. The hope from Congress was, on one hand, we don't want to go ahead and burden the federal court system. On the other hand, we want to maintain the rights and liberties, in this particular case, workers and businesses. Again, there's a reason why some metaphors exist. But you want to talk about threading a really, really tiny needle. Good luck with that. By the way, for listeners who might be students at VCU, if you found this discussion interesting or something you want to delve into even more, a gratuitous self-plug, take my administrative law class that I offer every spring. It's called administrative law because we talked about this.

**N. Rodgers:** If you were at another institution, there's probably a class like that local to you that you can take and if you're not in an educational institution, then sometimes you can take those classes at a reduced rate as a community member in order to learn more.

**J. Aughenbaugh:** You can audit the class. But I mean, this is the kind of thing. Again, there are trade-offs. We've identified easily half a dozen trade-offs in this discussion, of having agencies be given the authority to handle these disputes. But once you go ahead and create rights and you want to regulate interactions between two rather important parts of the American economy.

**N. Rodgers:** Employers and employees.

**J. Aughenbaugh:** Post Civil War as the nation's economy shifted from agrarian to industrialization, you had employers and employees. How do you go ahead and protect the interests of both who are extremely important for the nation's economy? Extremely important. Really. Post-World War II, the United States rise as a world power wasn't just that we add a whole bunch of nukes.

**N. Rodgers:** We also had an enormous labor force.

**J. Aughenbaugh:** We had the kind of economic growth that you've hardly seen in world history.

**N. Rodgers:** That nations dream of.

**J. Aughenbaugh:** How do you go ahead and make sure that these two important elements of that economic growth are getting along, they value one another, their rights and interests are protected and promoted?

**N. Rodgers:** To wrap us up, I want to ask one last question. Do you think that sometimes these disputes are filed to push the negotiations?

**J. Aughenbaugh:** Yes.

**N. Rodgers:** To get one side or the other to come back to the table and have a more reasoned discussion? Because it says in each one of these parts of this process that you can withdraw. Like at any point you can withdraw and say, you know what, never mind. We've settled it on our own.

**J. Aughenbaugh:** There is a literature within administrative law that does talk about how filing a claim with a regulatory agency that has an adjudication power or authority is seen as a negotiating tactic to force at least one of the parties in a dispute to actually take the dispute seriously because they don't want to go to a hearing. They don't want a final ruling from the board. You want to avoid that? Let's sit down and talk about this. Where is the consensus or middle ground here? But oftentimes it takes the filing of a complaint, we're serious. This is important to us. So you're going to sit down and actually talk to us?

**N. Rodgers:** It just seemed like when you look at the giant box that goes along the side of a flow chart that says you can withdraw at any time and you read along to it and it says parties have come to an agreement and all that other stuff, I was thinking, that's the labor boards way of saying, you don't have to keep this going if you can manage to arbitrate among yourselves.

**J. Aughenbaugh:** Yes.

**N. Rodgers:** If Lippert just walked out and said to the protesters, could you all just take the rat down? We will do our best to pressure Thor Industries to come to the table and talk to you but the rat is grossing out at least one of our users or whatever, then they could conceivably have worked that out among themselves. It's when the person gets recalcitrant, you walk out and you say, "Hey, would you consider taking down your 12-foot rat because it's scaring everybody?" They say, "No." Then you're like, "Okay, I'll file something to make you get it down." It turns out they were not able to do that because it is within their right to put up the 12-foot rat, which is just gross. Probably I would assume that once you get into a hearing situations because all of that has failed.

**J. Aughenbaugh:** Yeah. It's failed.

**N. Rodgers:** Well, this is interesting. It's interesting to me and maybe we'll explore other agencies that do this and the kinds of disputes that they settle. Because I find it fascinating that there's a whole entire agency that its point is to settle labor dispute.

**J. Aughenbaugh:** How about this? Another form of adjudication and you and I've talked about this off-recording. How about those agencies that use administrative hearings for the granting of licenses. What might be a really good follow-up episode Nia is for us to explore, for instance, the FCC, the Federal Communications Commission, which has the legal authority to decide who can own and operate radio and television stations in the United States.

**N. Rodgers:** Well, let's do it then.

**J. Aughenbaugh:** All right. Sounds good.

**N. Rodgers:** Cool. Thank you so much, Aughe. I appreciate it.

**J. Aughenbaugh:** Thank you, Nia.

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